FILED

NOV 28 1900

In the Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 119.

THE DIAMOND GLUE COMPANY,

Plaintiff in Error,

vs.

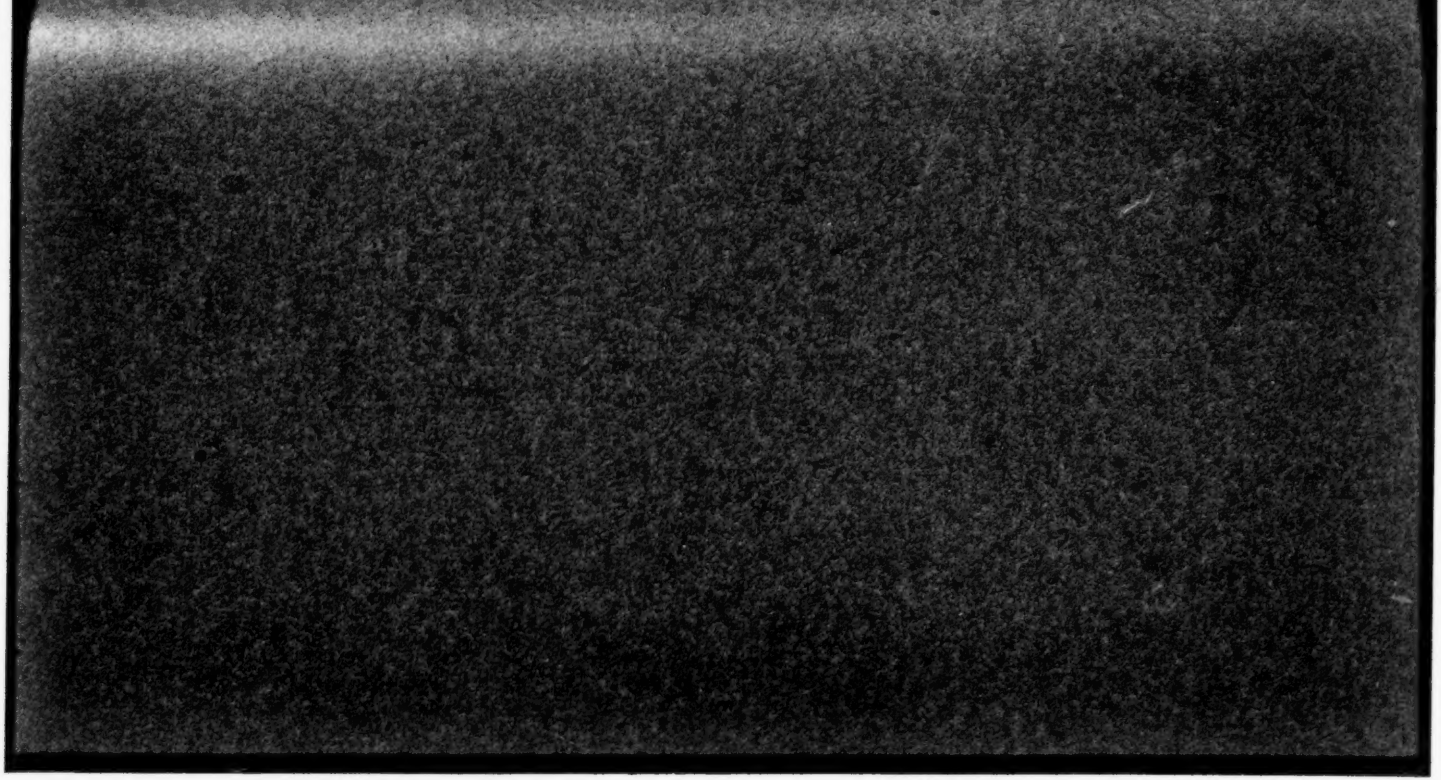
THE UNITED STATES GLUE COMPANY,

Defendant in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN.

GEORGE L. LOCKE,

Of Counsel for Defendant in Error.



SUPREME COURT OF THE UNITED STATES.

THE DIAMOND GLUE COMPANY,

Plaintiff in Error,

vs.

UNITED STATES GLUE COMPANY,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

The counsel for the plaintiff in error contend in their brief, among other things, that although the contract in question required plaintiff to transact business within the state of Wisconsin, yet it did not in fact so transact business; that the statute of Wisconsin, which is relied upon by the defendant in error, not becoming operative until after the execution of the contract, the question whether this statute impaired the obligation of the contract is to be determined as though the statute were passed at the last named date; and that by practical construction of the contract it did not bind the plaintiff in error to transact business in Wisconsin, that is to say, to operate the factory of defendant in error and superintend the manufacture therein. It seems that neither of these positions is tenable for the reasons following.

Both the pleadings and the evidence show that plaintiff was transacting business in the State of Wisconsin under the contract.

In the contract sued upon are the following clauses: The party of the second part agrees:

"To advise with and plan with the architect of party of the first part, and to oversee and supervise the plans of said

factory and to secure such economy of space and processes as may be gained from the practical experience the party of the second part has had in the operating of three glue factories, and party of the second part further agrees to give party of the first part the benefit of all its labor-saving devices and the benefit of its knowledge and experience used or acquired by it in the manufacture of glue.

It is further agreed that party of the second part *shall have the management of the manufacturing in said factory and shall operate the same for party of the first part and furnish a superintendent, whose salary shall not exceed $150* per month, to party of the first part, and that party of the second part by its officers *shall give said factory such personal supervision as may be necessary from time to time in the operation of the same*, and said officers will give party of the first part, in the management and operation of said factory, the benefit at all times during the life of this contract, of the experience and knowledge of said officers and their company." (T., pp. 10 and 11.)

In its original complaint is found the following paragraph:

"Said plaintiff further alleges that upon the completion of said plant, it took the management of the manufacturing therein, *and operated the same* for said defendant, and furnished a capable superintendent therefor, whose salary did not exceed $150 per month, to be paid by said defendant, and did by its officers give said factory such personal supervision as was necessary from time to time in the operation of same, and by its officers did give to said defendant in the management and operation of said factory the benefit, at all times during the operation of said factory by it and until the breach of the contract herein mentioned, of the experience and knowledge possessed by said plaintiff and by its officers in respect to the management and operation of the same." (T., p. 5.)

Plaintiff's complaint was sworn to by Mr. Morron, its vice-president, and the officer who, as the testimony shows, chiefly conducted the negotiations for the contract and the business transacted with the defendant under it. It was sworn to on February 3, 1900, and filed February 5, 1900. It stood with the allegation above quoted in it until after the demurrer to that portion of the defendant's answer setting up the Wisconsin foreign corporation law had been overruled on May 8, 1900, and until July 7, 1900, when plaintiff filed an amended complaint changing the paragraph above quoted so as to al-

lege "that defendant assumed the management of the manufacturing therein and operated the same." (T., pp. 22 and 25.)

Not until the Circuit Court, in overruling plaintiff's demurrer to defendant's answer, had held that the transaction of business by plaintiff in the State of Wisconsin without compliance with the foreign corporation law of that State disabled the plaintiff from suing upon the contract, did plaintiff discover that it had not been operating the plant. Then, for the first time, the exigencies of the case made it plain to plaintiff that in truth and fact it had not managed and operated defendant's plant, and accordingly its complaint was amended.

With all the facts before it, plaintiff concluded on the 3d of February, 1900, and had supposed up to that time that it had managed and operated the factory. In June, 1900, when the amended complaint was sworn to, the facts being unchanged, a different conclusion was necessitated by the view taken by the Court of the Law, and the conclusion, which is itself a fact in the case, was changed accordingly.

While, by amendment, plaintiff may be relieved from an estoppel by the record which would otherwise exist by virtue of the allegation in the original complaint, still that allegation stands as an admission, to be considered with all other evidence in the case, upon the question whether plaintiff did in fact manage and operate defendant's factory.

But there are other allegations in both the original and amended complaint which amount to admissions that plaintiff transacted business in Wisconsin, and which, being in the amended complaint, should be held to estop it.

Thus, in both the original and amended complaint it is alleged:

"Said plaintiff has at all times been ready and willing to perform the terms and conditions of said contract, and has in all respects fully complied with the terms and conditions of the same to be performed on its part." (T. pp. 5 and 25.)

As the contract stipulated that plaintiff "shall have the management of the manufacturing in said factory, and shall operate the same for the party of the first part (T., p. 11,)"

the above allegation in the amended complaint cannot be true, unless plaintiff did have such management and did operate the factory.

Again, it is alleged in both original and amended complaints that the plaintiff furnished the superintendents and gave to the defendant in the management and operation of the factory the benefit of the experience and knowledge possessed by plaintiff and by its officers in respect thereto. (T., pp. 5 and 25.) The testimony, all of which came from plaintiff's witnesses, is in entire harmony with and supports these allegations in the complaint, asserting the transaction of business in Wisconsin.

Mr. Morron testified.

"The U. S. Glue Company were supposed to send regular printed sheets of the boilings and manufacturing work down to us at the end of every month or every week. The papers handed me are the accounts received from the U. S. Glue Company by the Diamond Glue Company of the manufacturing. They tell the kind of material that has been worked up, how much glue was used, how much labor, how much the sundries are, and what the yield of the glue stock is—that is, the number of pounds of glue stock. We would keep track to see how much the glue stock was yielding. The sheets show that they were sent weekly. That date says up here, 'manufacturing account for the week ending blank.' I think these are all that the Diamond Glue Company received from the U. S. Glue Company. The first one is for the week ending July 29, 1899, and the last one for the week ending November 4, 1899."

"Mr. Morehead was the first superintendent whom the Diamond Glue Company sent to the U. S. Glue Company. He had been superintendent of our plant at Madison, and had been general superintendent at our other plant. I think he remained superintendent of the U. S. Glue Company at Carrollville, or Milwaukee, until some time the latter part of August, 1899. We furnished another superintendent by the name of Harden. I guess he is there now. *Mr. Morehead is employed by the Diamond Glue Company as General Superintendent.*" (T., p. 47.)

"I think the U. S. Glue Company commenced accumulating glue stock from the 1st of January, 1899. I advised them to sell that glue stock when they said they were going to complete their factory by March 1st." (T., p. 51.)

That defendant wished to change the plans so as to reduce the cost of its plant, and in that connection says:

"I talked it over with Mr. Morehead, and we came to the conclusion that we could get along with less vats. We came to the conclusion by putting in about 300 vats there would be enough of a plant. The bids contemplate a little over 400." (T., p. 56.)

Mr. Freshman, secretary and treasurer of plaintiff testified:

"I am acquainted with what are called the manufacturing sheets put in evidence. I examined them as they came in. The Diamond Glue Company keeps sheets for this purpose. We showed Mr. Hansen how to keep these sheets when he came to Chicago. I talked with Mr. Hansen, and I think Mr. Vogel, about the way these sheets were filled in. (T., p. 57.)

"The Diamond Glue Company did not operate the factory at all. *It assisted in the operation.* I used to come to Milwaukee, and I used to talk over things with the superintendent—assisted in an off-hand way—used to go there twice or three times a week, and talk things over so as to help him along—see how things were going. I gave no directions in regard to running the factory. My understanding is that all the Diamond Glue Company did in regard to operating the factory was to assist and advise." (T., p. 58.)

"The Diamond Glue Company furnished Morehead and Harden at two times as superintendent for the U. S. Glue Company. When I was up to the factory to help bring about a good product, the U. S. Glue Company did not ask me to do anything that I did not do that I know of. They asked no service to my knowledge that I failed or refused to render."

"Mr. Morehead is the originator of the machine that cut the glue. That machine was furnished the U. S. Glue Company by the Diamond Glue Company, in whose employ Mr. Morehead originated the machine." (T., p. 59.)

W. H. Morehead, the first superintendent furnished by defendant to plaintiff testified:

"Mr. Freshman came up frequently. I do not think any directions were given me in regard to the conduct of the manufacturing; *left entirely to use my own judgment* in the running of that plant so far as making the glue was concerned, and we would talk matters over in a general way." (T., p. 65.)

Fred Bassinger, cashier and bookeeper for plaintiff testified:

"I was sent by the Diamond Glue Company to render assistance to the U. S. Glue Company. I think it was the last of September, 1899; I went to their factory at the request of Mr. Freshman, who was there the day before. I saw Mr. Hansen's bookeeper. I made some little suggestions about changing his system so it would conform with our ideas of getting the reports of the shipments. I took up a lot of forms that were used in our business to give him an idea of what he should do in order to get proper results. I wanted to give him the benefit of our experience. I think he adopted all the suggestions I proposed to him as to the forms, etc., but he did not seem to like the idea of changing his books." (T., p. 69.)

This testimony from plaintiff's own witnesses shows that plaintiff, through its officers, was consulted and advised about the erection of the plant and changes of plans therefor; that it furnished the superintendents; that through its superintendents so furnished, it had general charge and control of the manufacturing operations; that plaintiff's officers visited the plant twice or three times a week, consulting with defendant's officers at Milwaukee, and with the superintendent at the factory about the conduct of the business; that plaintiff procured machinery for defendants; that plaintiff sent its bookkeeper to instruct defendant's bookkeeper in regard to the keeping of accounts and the making of reports, and, as Mr. Freshman says, plaintiff did everything required of it under the contract. That this testimony shows the transaction of business within the State of Wisconsin would seem to be beyond dispute.

In *Mutual Life Insurance Co. vs. Spratley*, 172 U. S. 602,

it was held that an insurance company which had withdrawa its agents from the State of Tennessee and ceased to write new insurance in said state, but which continued to receive payments of premiums upon policies previously written, was doing business in Tennessee within the meaning of the statute of that state providing for service of process upon foreign corporations, and that service upon an agent sent especially into the state to investigate a particular loss, was good. The Court said (p. 611.)

"It cannot be said with truth, as we think, that an insurance company does no business within a state unless it have agents therein who are continuously seeking new risks and it is continuing to issue new policies upon such risks. Having succeeded in taking risks in the state through a number of years, it cannot be said to cease doing business therein when it ceases to obtain or ask for new risks or to issue new policies, while at the same time its old policies continue in force and the premiums thereon are continuously paid by the policy holders to an agent residing in another state, and who was once the agent in the state where the policy holder resided. This action on the part of the company constitutes doing business within the state, so far as is necessary, within the meaning of the law upon this subject."

In *Cooper v. Ferguson*, 113 U. S. 727,

the court considered the clause in the constitution of Colorado which prohibited only "the carrying on of business" by a foreign corporation without compliance with the statute. The Wisconsin statute declares that

"No corporation shall *transact* business or acquire, hold or dispose of property in this state until such corporation shall have"

complied with the statute. It may well be contended that "transacting business" means no more than "doing any business" as the latter phrase, found in the Alabama Constitution, was construed in

Farrior v. N. E. Mortgage Security Co., 88 Ala. 275.

But such contention is not necessary in this case; since here is a series of continuous transactions, the carrying on of business under its broadest definition.

In *Commonwealth v. Standard Oil Co.*, 101 Pa. St. 119,

it was held that the holding of an interest in a partnership in Pennsylvania was a doing of business in that state by the Standard Oil Company, a corporation of Ohio, within the meaning of the tax laws of Pennsylvania.

In *Female Academy v. Sullivan*, 116, Ill., 375.

the court said (p. 384):

"Receiving lands in this state by devise, and the assertion in the state of ownership over them, we regard a sufficient doing of business in this state to bring appellant within the purview of this language of the section."

The section referred to was Section 26 of the Illinois corporation law, which provides:

"Foreign corporations, and the officers and agents thereof, doing business in this state shall be subject to all the liabilities, restrictions and duties that are or may be imposed upon corporations of like character organized under the general laws of this state, and shall have no other or greater powers."

The case last quoted from was cited and approved in Pa. Co. for Ins. on Lives v. Bauerle, 143 Ill., 459-471.

In *Farmers' Loan and Trust Co. v. The Lake Street Elevated Co.*, 173, Ill., 439,

it was held that the Loan & Trust Company, a non-resident corporation, could not without compliance with the Illinois corporation law act as trustee under a mortgage to secure bonds issued by the Elevated Railway Company, an Illinois corporation, which trust deed authorized the trustee to certify the bonds and superintend their sale, to examine, by its agents, the books of the Illinois corporation and make reports to the trustee, and advise in controversies between the trusteee and the mortgagor. The trust deed in that case provided that the agent so appointed should be paid by the mortgagor. The Court said (p. 456):

"In the present case the trustees under the deed of trust executed by the Lake Street Elevated Railway Company certified and delivered 7,574 bonds of $1,000 each. From time to time in 1894 and 1895, the appellant rendered and mailed to the railway company bills for certifying bonds and accepting the trust deed, and for receiving subscriptions, etc., which bills were received and paid by the railroad company. The trustees exercised constant supervision over the application of the bonds as issued, correspondence was carried on between the railroad company and the appellant in reference to the issuance and delivery of the bonds and in regard to releases and accounts. On August 7, 1894, the appellant appointed an agent under the trust deed who did a large amount of business in behalf of the appellant in Chicago as such agent. This appointment was ratified and accepted by the railroad company by resolution of its board of directors. The agent accepted the agency, and frequently examined the books of the mortgagor and looked after the issuance and application of the several lots of authorized bonds; he made reports, as agent to the appellant, and to the American Trust & Savings Bank. He gave advice in reference to the questions in dispute which arose between the appellant and the railroad company from time to time. From these and other facts

appearing in the record which it is not necessary here to specify, it is manifest that the appellant was doing business in the State of Illinois within the meaning of said Section 26."

The management and operation of the plant formed the main feature of the contract, and was the main service for which compensation was to be paid to the plaintiff. The contract is plain, clear and unambiguous, and there is no room for construction.

The fifth contention of counsel for plaintiff in error is that, by practical construction, the parties have eliminated from this contract the very benefit which it was largely, if not chiefly, intended to secure to the defendant.

It is sufficient to say that since the contract is plain, unambiguous and in no way obscure, there is no room for construction, practical or otherwise.

Chicago v. Sheldon, 9 Wall., 50-54.

This contention, if available, should have been, that there was a modification of the contract, by which plaintiff was relieved from performing this service. Plaintiff dare not rely upon such contention, because such modification, if made, must have been after the 1st of September, 1898, and would have resulted in practically a new contract, entirely departing in substance from the original agreement, and one which would have been clearly subject to the Wisconsin statute in question; but particularly because the action is on the contract as written, and the breach relied upon is defendant's refusal to permit further performance of the contract as written; and the fact, if it existed, that up to the time of breach, defendant had not insisted upon performance of this particular stipulation would be immaterial. Under the pleadings plaintiff could not recover unless it had the right to fully perform.

But that such destructive construction of the contract was not made, and that such modification was never contemplated, is clearly apparent, not only from the complaint and original complaint, but from all the facts of the case.

In both the original and amended complaint, this paragraph occurs by way of inducement, and shows the considerations which moved the defendant to enter into this contract:

"Said plaintiff further alleges that prior to said 25th day of June, 1898, it had had large experience in the construction and operation of factories for the manufacture of glue and in the supervision and management of the same, and that its officers then possessed knowledge and experience in the construction and management of such factories and in the sale and disposition of their products and of all the raw material which is sold to or used by companies engaged in the manufacture or selling of glue or any of its bi-products, and that it possessed large facilities for selling and disposing of the same; all of which was at said times well known to said defendant, its officers, agents and stockholders." (T., pp. 3-23.)

It further appears, by allegations present in both complaints, that the stockholders and organizers of the defendant were tanners, with no experience in the directions mentioned. (T., pp. 3-23.)

It appears further from both complaints and from the contract itself, that the consideration for which defendant stipulated was the advantage of the experience and technical skill and knowledge of the plaintiff and its officers, and that the compensation for all of these considerations was to be simply measured by commissions on sales. The sale of the product was but one, and not necessarily the greater one, of the considerations, although it was used as affording a measure of compensation.

That this vital consideration should have been construed out of the contract is incredible. The idea of any such construction never occurred to the plaintiff or any of its officers, until the necessity for such construction was suggested by the decision of Judge Seaman on the demurrer. That such construction is an after-thought and never existed in fact, clearly appears from the oath of the executive officer of the plaintiff to the original complaint, and as clearly appears from the plaintiff's own testimony in the case, as cited above.

Sec. 1770b Wisconsin Statutes of 1898 is not unconstitutional as respects the contract in suit, for the reason that it was passed before the contract was entered into.

Only laws passed after a contract has come into existence can be obnoxious to Sec. 10 of Art. 1 of the U. S. Constitution, which declares that no state shall *pass* any law impairing the obligation of contracts.

In *Edwards v. Kearzey*, 96 U. S., 595-603.

this court said:

"The inhibition of the constitution is fully prospective. The states may legislate as to contracts thereafter made as they may see fit. It is only those in existence *when the hostile law is passed* that are protected from its effect."

In *Denny v. Bennett*, 128 U. S., 489-494,

speaking of the contention that a Minnesota Statute impaired the obligation of contracts, this Court said:

"So far as an attempt might be made to apply this statute to contracts in existence *before it was enacted*, it would be liable to the objection raised, and therefore, in such a case, of no effect, but the idea has long been settled that statutes *which are in existence* at the time the contracts are made are not void."

In 2 Rapalje & Lawrence's Law Dictionary, 935,

we find this definition of the word "passed" as used with reference to the passage of a statute:

"When a legislative bill is finally assented to by a majority vote of the body having its enactment in consideration, it is said to be "passed" by such body, and when also passed by the other house and approved by the executive, such bill becomes a statute."

In Anderson's Law Dictionary, 754,

the word "passed" is defined:

"To receive approval, as for a bill, an act, a law to pass one or both houses of legislation and be signed by the executive.

"An act of a legislature is "passed" when it has gone through the forms necessary by the constitution to give it validity as a binding rule of conduct; its passage dates from the time when it ceases to be a mere proposition or bill and passes into a law."

In *Johnson v. Fay*, 16 Gray, 144-5,

the Supreme Court of Massachusetts, speaking of an act of the legislature, says:

"The plaintiff does not come within the exception contained in the confirming clause, because he did not acquire his title prior to the passage of the act, by which we understand, the time when it had passed through the various stages rendered necessary by the provisions of the constitution to make it a valid statute and been approved and signed by the governor."

In *Commonwealth v. Bennett*, 108 Mass., 30,

the defendant was prosecuted under a statute of 1869 for selling liquor on July 4, 1870. A statute had been passed and appproved by the governor June 22, 1870, but not to take effect until July 22, 1870, which repealed the statute of 1869. The statute of 1870 contained a clause saving "any penalty or forfeiture already incurred under the provisions of any law in force prior to the passage of this act." The court said: (p. 32):

"If the saving clause had included only penalties or forfeitures incurred before the passage of this act, it would not have applied to the defendant's case," citing *Johnson v. Fay*, 16 Gray, 144.

In *Baker v. Johnson*, 2 Robertson, N. Y., 570-579,

the Court speaks of an act of Congress approved July 1, 1872, as

> "the tax law then in existence and which by its terms was to go into effect on the 1st of August,"

and held that the fact of taking effect of the law was postponed by the secretary of the treasury, as provided might be done in the act, did not excuse the performance of a contract entered into upon the supposition that the act would take effect on August 1st, thus holding that the parties were bound to take notice of the provisions of the act.

In *Smith v. Morrison*, 22 Pick., 430,

a question arose as to the validity and operation of a section in the revised statutes of Massachusetts, which were enacted November 4, 1835, but did not go into effect until May 1, 1836. The section in question limited the time for the commencement of actions upon judgments of Justices of the Peace to six years from the rendition of such judgment. It was claimed that inasmuch as the statutes did not go into effect until May 1, 1836, the section in question, if construed as applicable to

judgments rendered more than six years prior to that date, would be unconstitutional as impairing the obligation of contracts. The court said (p. 432):

"The answer to this objection is, that the Revised Statutes were passed on the 4th of November, 1835, and no action, commenced before the 1st of May following would be barred by the statute, which is limited to actions commenced after that time, when the Revised Statutes took effect. Whether the time allowed for creditors to commence their actions was a reasonable time or not, was a question within the exclusive province of the legislature to determine."

Thus it was explicitly declared that the statutes were *passed* November 4, 1835, and impliedly held that persons who might be affected by the limitation contained therein, which would become effective May 1, 1836, were bound to take notice of the passage of the statutes, and govern themselves accordingly.

And this latter proposition was directly held in *Stine v. Bennett*, 13 Minn., 138, where a precisely similar question was presented upon analogous facts, and the Court said (p. 143):

"This act upon its passage by the legislature and approval by the governor, had all the constitutional requisites of a law in our state. As a public law, therefore, although by its provisions not to take immediate effect, all persons were required, from its approval, or at least from its publication, to take notice of its existence and terms, and that at the time appointed its provisions would be operative for all purposes. This gave notice to all that a change in the law regulating the remedy upon the causes of action embraced in the act, would take place at the time appointed to determine its suspension, and that thereafter the remedy could be enforced only within six years from the time the cause of action accrued."

In *Logan v. State*, 3 Heisk., 442,

construing Sec. 20 of Art. 2 of the Tennessee Constitution, which provides that "no *law* of a general nature shall take effect until forty days after its passage unless" passed over the governor's veto. The Supreme Court of that state said:

"The meaning of this section is, that the law shall not take effect until forty days *after it has become a law; that is, after it shall have received the approval of the governor; or, upon his re-*

fusal to approve, shall have been otherwise passed under the provisions of the constitution."

To the same effect are:

Hill v. State, 5 Lea, 725.
In re Keney's estate, 56 Hun., 117.
Jones v. Hutchinson, 43 Ala., 721.
Chumasero v. Potts, 2 Mont., 242.
Wartman v. Philadelphia, 33 Pa. St. 202.

Through all the decisions runs the distinction between the passage or enactment of a law and its taking effect; and it is uniformly held that the passage or enactment of a statute means the completion of the formalities required by the fundamental law, and has no relation to the time when the statute may become operative, except in those few cases where the statute itself provides a different rule of interpretation or the context shows that the word "passage" or other similar word was intended to mean the time of taking effect. Such a case was

Charless v. Lamberson, 1 Ia., 435,

cited and relied upon in the brief for plaintiff in error. In that case the Court had under consideration a provision of the code of Iowa exempting the homestead of a debtor, but providing that it might "be sold on execution for debts contracted prior to the passage of this law or prior to the purchase of such homestead." The Constitution of Iowa provided that "no law of a public nature shall take effect until the same shall be published and circulated in the several counties of this state, by authority." A section of the code declared that the terms "hereafter" and "heretofore," as used in the code, have relation to the time when this statute takes effect; the Court held that the words "prior to the passage" as used in the homestead exemption section, amounted to the same thing as if the legislature had used the word "heretofore," and therefore must relate to the time of taking effect, and not to the time of passage. Its conclusion was based on the ground that as the constitution prohibited laws from taking effect until publication, rights could not grow up under

such a law before it was published. It will be observed that the Court recognizes (p. 443) the distinction here contended for between the passage and taking effect of a law.

In addition to some provisions, not material here, respecting the passage of laws, the Constitution of the State of Wisconsin, in Sec. 10 of Art. 5, provides:

"Every bill which shall have passed the legislature shall, before it becomes a law, be presented to the governor; if he approve, he shall sign it, but if not, he shall return it, with his objections, to that house in which it shall have originated, who shall enter the objections at large upon the journal and proceed to reconsider it. If, after such reconsideration, two-thirds of the members present shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and if approved by two-thirds of the members present it shall become a law. But in all such cases the votes of both houses shall be determined by yeas and nays, and the names of the members voting for or against the bill shall be entered upon the journal of each house respectively. If any bill shall not be returned by the governor within three days (Sundays excepted) after it shall have been presented to him, the same shall be a law unless the legislature shall, by their adjournment, prevent its return, in which case it shall not be a law."

And, in Sec. 21 of Art. 7, it is provided:

"The legislature shall provide by law for the speedy publication of all statute laws, and of such judicial decisions, made within the state, as may be deemed expedient. And no general law shall be in force until published."

Sec. 10 of Art. 5 above quoted contains the only requirements necessary to be complied with in the making of a law in Wisconsin, and when the formalities therein directed have been gone through with, the law is complete in every respect, although it may never become operative, for want of publication, under Sec. 21 of Art. 7 above quoted.

As has been shown in the other brief, the statutes of 1898 were passed by the legislature and approved by the governor in August 1897. They were published and certified by the judges of the Supreme Court, as provided in the revision itself, in May, 1898, six weeks before the contract in suit was entered into. Under all of the authorities, Sec. 1770b, was, on the 25th day of June, 1898, when this contract was executed,

a law of the State of Wisconsin, of which every person was bound to take notice, and which entered into the contract between the parties to this action, and therefore could not impair its obligation.

Sec. 21 of Art. 7 of the Wisconsin Constitution above quoted, declares that "no general law shall be in force until published." The constitutions of many other states contain similar provisions, some of them postponing the taking effect of a law for a specified number of days after its passage or after its publication. It is also frequently provided in statutes that they shall not take effect for a certain time after passage, or after publication, or until a specified day. Such was the case with the Wisconsin statutes of 1898, which though enacted in August 1897, provided that they should not be in force until September 1, 1898. The object of all these provisions, it has been uniformly held, is to allow the people to become familiar with the impending changes in the statute law. The accomplishment of this object necessarily implies that the people to be affected by the law are bound to take notice of its terms before the time arrives at which it is to go into effect. The whole purpose and object of postponing the taking effect of a law is inconsistent with the idea that during the time intervening between its passage and the date fixed for it to take effect, the public are not chargeable with knowledge of it, or, having knowledge of it, are at liberty, by contract or otherwise, to evade its provisions. The period of suspense is provided in order that the citizen may so adjust his affairs as to comply with the law when it becomes operative; not that he may enter into contract obligations, purely executory, the performance of which will be in violation of the law. And the provision in the Constitution of the United States relied upon by plaintiff in error was never intended to enable parties, by contract, to put themselves in a position to defy a law which had passed through all the constitutional stages, and had been duly published prior to the making of such contract, but which, under constitutional or statutory provisions, designed solely to enable parties affected to ad-

just their affairs in harmony with the new law, was to take effect after the date of the contract.

Again, the clause of the federal constitution relied upon is in restriction of the power of the states, and this restriction goes no further than its words carry it.

But it is not necessary to resort to any rule demanding strict construction:

For the reason that the inhibition is directed against action by the legislature of a state, against legislation, that is, the making or enactment of laws. A statute may not be operative until it is published; but it does not follow that the printer aids in the enactment or is part of the lawmaking power.

Mead v. Bagnall, 15 Wis., 156-161.

So a law may not be operative until after the lapse of a prescribed period. It cannot be said that time contributes to the passage of the law, or in any way aids in its enactment. Therefore, the question whether a given statute is constitutional or not, is to be determined at the instant of its passage. If, at the time of the completion of the legislative act, no contract existed whose obligation is impaired, the constitutional provision has not been violated.

It would be remarkable indeed, if the completed act of a legislature could be rendered unconstitutional by a subsequent act of citizens. It is a contradiction in terms to say, that at the time its action was completed, the legislature had not violated this direction of the federal constitution, but that by the subsequent act of private citizens or foreign corporations this act of the legislature, constitutional when taken, came to violate the federal constitution.

It would seem too clear for argument that since this prohibition of the constitution is directed to the legislative body, and prohibits certain action by it, the complexion of its acts cannot be determined by circumstances to occur long after this action was complete and the legislature had dissolved and become a thing of the past.

Plaintiff could not by contract acquire any vested right to do business in Wisconsin.

Counsel's fifth proposition is that the plaintiff acquired a vested right under this contract because it was made in the interim between the passage of the act and the time it became operative.

This contention, of course, proceeds upon the assumption (unwarranted as we claim) that the contract at the time it was made, was not subject to the prospective operation of the law, and that plaintiff acquired such a vested right in the subject of the contract as could not be impaired within the rule of

Fletcher v. Peck, 6 Cranch, 87-138.

The difficulty is that the subject of the contract in question is not property or the acquisition of property, but the rendition of services in a foreign territory.

This contention, plainly stated, means that the plaintiff, by making, in June, 1898, an agreement purely executory, acquired a vested right to transact business in Wisconsin for a term of years, although by the contract no right in property or to acquire property passed; and counsel should have cited:

Bedford v. Eastern B. & L. Asso., 181 U. S., 227.

where this Court has shown the limit to which this contention can go.

In that case, this Court held that by the contract made by the loan association before the passage of the law prohibiting it from carrying on business in Tennessee, it had obligated itself to make the loan under consideration, as an incident to the reception of the borrower as a member of the corporation, and that this obligation could not be wiped out by any act of the Tennessee legislature subsequent in point of time.

It is apparent that the case is not parallel, since there was the completion of a single transaction which the corporation had obligated itself to perform. Here, the obligation, if any exists, is to transact business in the State of Wisconsin for a term of years.

The cases would have been more nearly parallel if, in that case, the building association had, before the passage of the act, contracted with an agent in Tennessee to represent it in that state in soliciting subscriptions to the stock of the association for the term of twenty years, for compensation to be measured by commissions upon the subscriptions secured.

The question then would have arisen there, as here, whether a state could be deprived of power to exclude a foreign corporation from the transaction of continuous business within its borders, by the executory contract of such corporation with a private citizen.

It would be a singular conclusion that the Federal Constitution enables tramp corporations to neutralize state legislation regulating their action, and enables them to domesticate themselves in any state against the will of the sovereign.

If such a conclusion were to be announced by this Court the legislature of all the states would, within a very short period, be paralyzed by executory contracts of agency and the like. Such an announcement from this Court would enable a New Jersey Corporation to forestall all hostile legislation in Wisconsin or Illinois, by making an executory contract of agency for a term of fifty years. This, of course, is absurdity.

It is submitted therefore, that since the only breach charged is refusal by defendant to permit plaintiff to continue to transact business within the State of Wisconsin; since such transaction of business was forbidden; and since plaintiff had no right to perform save such as it arrogated to itself by virtue of its own promise to do the forbidden acts; since plaintiff's presence in Wisconsin at any time was permissive only; and since plaintiff had notice at the time of the execution of the contract that performance was forbidden, it has no right of action and the judgment of the Court below should be affirmed.

GEORGE LINES,
Of Counsel for Defendant in Error.